

The stipulations as specifically set forth in the July 28, 1994 Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the liability, if any, of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant, a certified nurse's assistant, was working for respondent in Eudora, Kansas, on August 25, 1988, the date of injury. On that date, claimant, who has a long history of asthma since age three (3), was participating in a fire drill during which time she was exposed to smoke and fumes from a controlled fire. Prior to this incident, claimant filled out an employment application advising her employer that she suffered from asthma. On the date of claimant's accident she advised her supervisor that she could not participate in the drill due to her asthmatic condition. She was informed that her participation was "mandatory."

Subsequent to her exposure on the date in question, claimant suffered from a multitude of asthmatic symptoms including difficulty breathing, coughing and difficulty sleeping and later developed pulmonary breathing problems for which hospitalization has been required on more than one occasion.

Dr. Thomas A. Beller, a pulmonary medicine and critical care specialist, examined and treated claimant, opining claimant's exposure on the date in question caused a portion of her problems. Dr. Beller indicated that people with a history of asthma are inhalant sensitive and he strongly recommends that these people avoid the agents which cause this sensitivity including fumes, dust and smoke. He further added that asthma predisposes a person to additional injury if they are around the toxic substances and felt that but for this asthmatic condition claimant would not have suffered the problems to the extent encountered. He did not feel claimant's exposure to smoke on the date in question was coincidental as claimant developed too many problems after the date of accident. He felt the smoke did exacerbate her problem.

Claimant was later examined by Dr. Gerald R. Kerby, an internal medicine pulmonary disease specialist, who diagnosed moderately severe asthma. He felt that smoke could be the trigger which could cause asthma to go into a cycle and become more active and felt that the smoke and fumes could worsen claimant's asthmatic condition. Both Dr. Beller and Dr. Kerby admitted the exact extent to which the smoke, on the date of injury, aggravated claimant's condition was very difficult to pinpoint.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers wholly, or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the Act if the employee is afflicted with an impairment of such character as to

constitute a handicap in obtaining or retaining employment. Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980). In order to be relieved of liability under this section, the employer must prove that the employer had knowledge of the pre-existing impairment at the time the employer employed the handicapped employee or that the employer retained the handicapped employee in employment after acquiring such knowledge. K.S.A. 44-567(b).

The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The claimant advised respondent on her employment application that she suffered from asthma and further informed her supervisor on the date of injury that she should not participate in the drill as the smoke and fumes would have a detrimental effect on her asthma. The Appeals Board is persuaded that the respondent has met its burden of proving that it knowingly retained a handicapped employee within the definition contained in K.S.A. 44-567(b). The Appeals Board further finds that the respondent had knowledge of this handicap sufficient to satisfy the requirements of K.S.A. 44-567(b) and respondent retained the employee after acquiring such knowledge.

K.S.A. 44-567(a)(1) states in part:

“Whenever a handicapped employee is injured or is disabled or dies as a result of an injury which occurs prior to July 1, 1994, and the administrative law judge awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers compensation fund”

The Appeals Board is persuaded that the medical evidence supports the respondent's contention that claimant would not have had an exacerbation of her asthmatic symptoms on the date of accident but for the aggravation of her pre-existing condition. While all of claimant's breathing problems are not directly traceable to the incident of August 25, 1988, this medically supported exacerbation of claimant's condition persuades the Appeals Board that the liability in this matter should be borne by the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated July 28, 1994, shall be, and hereby is, affirmed in all respects and an award of compensation is herein entered in favor of the respondent and against the Kansas Workers Compensation Fund with the Kansas Workers Compensation Fund reimbursing the respondent and its insurance carrier for 100% of any and all monies paid in this matter for the injury to claimant on August 25, 1988.

The fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed to the Kansas Workers Compensation Fund as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Appino & Biggs Transcript of Settlement Hearing	\$39.00
Braksick Reporting Service Transcript of Regular Hearing	\$320.05
Curtis, Schloetzer, Hedberg, Foster & Associates Transcript of Motion Hearing	\$28.06
Deposition of Thomas A. Beller, M.D.	\$193.90
Deposition of Gerald R. Kerby, M.D.	\$199.50

IT IS SO ORDERED.

Dated this ____ day of October, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy G. Lutz, PO Box 12290, Overland Park, KS 66282
Eugene C. Riling, PO Box B, Lawrence, KS 66044
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director